NO. 22461

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROOSEVELT MONTGOMERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

STATEMENT OF ISSUES

1. Did defendant's failure to sign the waiver accompanying the Miranda warning exhibited and read to him preclude the Government's use of his subsequent admissions in the trial?

2. Is the evidence of an informant legally sufficient to support the defendant's conviction?

3. Was the sentence imposed an abuse of judicial discretion by the trial judge?

4. Does 21 U.S.C. §174 require the defendant to testify against himself or otherwise invade the defendant's right against self-incrimination in violation of the U. S. Constitution

Amendment V?

5. Does the statutory evidence rule, in 21 U.S.C. §174 irrationally associate possession of narcotics with the fact of importation contrary to law, or with knowledge by the defendant of such illegal importation?

6. Must the indictment allege in what respect the importation of heroin is unlawful?

II

STATEMENT OF FACTS

This is an appeal by defendant Montgomery, pursuant to 18 U.S.C. §§ 1291, 1294, from a conviction for violations of 21 U.S.C. §174.

On August 9, 1967, the United States Grand Jury for the Central District of California, returned an indictment charging Montgomery and a co-defendant:

In Count Seven, with knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of 26.890 grams of illegally imported heroin, a narcotic drug, in violation of 21 U.S.C. §174 (R.T. p. 13); [1/] in Count Eight, with knowingly and unlawfully selling and facilitating the sale of 26.890 grams of illegally imported heroin, a narcotic drug, in violation of 21 U.S.C. §174 (R.T. 13), and, in Count Nine, with

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1/ "R.T." refers to Reporter's Transcript.

knowingly and unlawfully selling 26.890 grams of illegally imported heroin, a narcotic drug, without a written order issued to the purchaser by the Secretary of the Treasury of the United States, in violation of 26 U.S.C. §4705 (a) (R.T. 14).

On September 26, 1967, before the Honorable Charles H. Carr, United States District Judge, the case proceeded to jury trial (R.T. 12).

On September 27, 1967, the jury found the defendant guilty of counts seven and eight (R.T. 205-206).

On October 9, 1967, the Court sentenced the defendant to ten years on each count, the sentences to run concurrently (R.T. 226-227).

On October 9, 1967, the defendant filed a notice of appeal (C.T. 25). 2/

At the trial, one Clint Johnson, the informant (R.T. 45) testified that he had a conversation with the co-defendant Roy Nicholson on July 17, 1967, and that this conversation concerned the purchase of heroin (R.T. 46-47); that he had an additional conversation with Nicholson on July 18, 1967, concerning the purchase of heroin (R T. 47). That after these conversations the witness, Clint Johnson, reported the substance of them to Agent Krueger of the Federal Bureau of Narcotics (R.T. 47).

On July 19th after a conversation with Roy Nicholson concerning the purchase of heroin Johnson met with Agent Krueger on 85th Street about one half block west of Figueroa Street. At

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2/ "C.T." refers to Clerk's Transcript.

this meeting Agent Krueger gave Johnson the sum of $175.00 and instructions on how to purchase the heroin (R. T. 50).

At this meeting Agent Krueger searched Clint Johnson and found that he had neither money nor narcotics except for the $175.00 which Krueger had given Johnson (R. T. 51).

Following this meeting Clint Johnson went to the residence of Roy Nicholson, got out of his car, met Roy Nicholson outside and engaged him briefly in conversation and entered Nicholson's house (R. T. 52). Upon entering the house Clint Johnson was introduced to the defendant Montgomery. Montgomery said, "Let's take a ride". Then Nicholson, Montgomery and Johnson entered Montgomery's car and drove to a gas station located at San Pedro and 85th Street. Montgomery drove, Johnson was in the front passenger seat and Nicholson was in the back seat behind Johnson (R. T. 52-54).

At the gas station Montgomery said, "Give me the money", which was $300.000. Johnson insisted upon seeing what he was purchasing. Nicholson gave Johnson $125.00 which was then added to Johnson's $175.00 furnished by Agent Krueger. Montgomery then reached down under the dashboard to the left of the steering wheel and removed a brown bag which contained a small balloon which contained heroin. Johnson then handed the $300.00 to Montgomery. Montgomery placed the money in his shirt pocket, drove around the block and back to the residence of Roy Nicholson (R. T. 54-55).

At this point Montgomery let Johnson and Nicholson out of

his car and they proceeded north on Avalon Street where they were placed under arrest (R. T. 55).

Agent Joseph E. Krueger of the Federal Bureau of Narcotics took the stand for the Government. Agent Krueger testified that he had been a narcotics agent for four years (R. T. 74).

Agent Krueger testified that on July 19, 1967, he met Clint Johnson, searched him and his vehicle and -- finding neither money nor narcotics furnished him with $175.00 of official funds, the serial numbers of which had previously been recorded (R. T. 75-76). Shortly thereafter, Johnson drove to Nicholson's house while Agent Krueger was in surveillance. He saw Johnson meet Nicholson; then both entered the house and disappeared from sight for perhaps five minutes.

Between 1:00 p. m. and 1:10 p. m. Nicholson, Johnson and Montgomery exited the house and entered a 1964 white over pink Cadillac and drove to a gas station at the corner of 85th and San Pedro Streets. They remained there for about five minutes, after which time the vehicle was observed to circle the block and return to Nicholson's house (R. T. 76-77). At that point the vehicle parked and Johnson and Nicholson got out, entered another vehicle and drove away from the area under Krueger's surveillance. As he was leaving Krueger observed the defendant Montgomery walk to the front porch area of 352 East 85th Street (R. T. 77-78). At approximately 1:15 or 1:20 in the afternoon about three or four blocks from the 85th Street residence Krueger received the hand signal from Johnson indicating the sale had been made.

At that time Krueger arrested Johnson and Nicholson. The arrest of Johnson was designed to protect Johnson from the others and throw them off of the scent. The heroin was removed from under the dashboard of the vehicle to the left of the steering column (R. T. 78-79).

Agent Krueger then proceeded with other agents to the address on 85th Street where he observed the defendant Montgomery standing in front of the residence. Krueger then with Agent Paulis accompanying him walked up to the defendant Montgomery and advised him that he was being arrested for violation of the Federal Narcotics Laws. Agent Krueger then searched Montgomery and retrieved a quantity of money from his person (R. T. 79-80).

Subsequent to the arrest Agent Krueger went with the defendant Montgomery to the Los Angeles branch office of the Bureau of Narcotics where the money recovered from Montgomery was found to be a part of the $175.00 which Krueger had furnished Johnson (R. T. 80-81). After determining this agent Krueger admonished the defendant Montgomery of his constitutional rights as follows:

BY MR. GLASSMAN:

Q Tell us at what time, if you recall, you advised this defendant of his constitutional rights, where it was and who was present.

A I advised personally, myself, first advised Mr. Montgomery of his constitutional rights at

approximately 2:00 p. m. here in my office in this building on the 19th of July, and I was in the presence of Agent Jarrett, Agent Paulis, and Agent Osmut at that time.

Q Would you tell us, please what rights you advised this defendant of.

A Yes, sir. I once again advised him that he was under arrest for violation of the federal narcotic laws. I advised him that he need not make any statement to me, that if he did make any statement to me it could be used against him in a court of law; that he did have a right to an attorney; and if he so desired an attorney he could have one at any time during those proceedings or any proceedings thereafter; and that if he could not afford an attorney, the Government would provide one for him.

Q And did Mr. Montgomery indicate in any way that he had heard and understood the constitutional admonotion which you had given to him?

A Yes, sir, he did. He said that he understood his rights, I further asked him to read a form which our agency uses to formally advise them in writing of their rights, and I asked him if he wished to sign the form indicating simply that he understood his rights but he did not wish to sign any forms whatsoever.

Q At that time, after you had advised the defendant of his constitutional rights, as you have just testified to, were there any statements made to you by the defendant?

A Yes, sir, there were.

Q Would you tell us and relate to the jury that conversation.

MR. COCHRAN: Just prior to that, may I have one or two questions on voir dire?

THE COURT: Yes, I will allow it.

MR. COCHRAN: Thank you very kindly, your Honor.

VOIR DIRE EXAMINATION

BY MR. COCHRAN:

Q Just briefly, Agent Krueger, at any time did Mr. Montgomery request that you call an attorney for him?

A No, he did not.

Q At any time did you tell him that although he had a right to an attorney he didn't need one because the two of you could work something out?

A No, I did not.

Q Did any other agent in your presence ever make that statement?

A Not to my knowledge, sir.

MR. COCHRAN: Thank you.

I have nothing further on voir dire, your Honor.

THE COURT: Proceed.

DIRECT EXAMINATION (Resumed)

BY MR. GLASSMAN:

Q Would you relate the substance of the conversation that you had with the defendant Montgomery.

A Yes, sir.

MR. COCHRAN: Your Honor, I will object to any conversation on the ground that I think we should have an offer of proof on the grounds that the total statement may be hearsay. There may be certain admissions, but the total statement may very well be hearsay.

THE COURT: I will allow the statement. I don't think it could be if it is in the presence of the defendant. I will allow the statement.

MR. COCHRAN: Very well, your Honor.

THE COURT: Go ahead, counsel.

BY MR. GLASSMAN:

Q Would you please answer, Agent Krueger.

A Yes, sir. Just shortly after I had advised

Mr. Montgomery of his constitutional rights, I was taking and completing a form which we consider a personal history sheet, a form which encompasses the name, date of birth, place of birth, names of relatives, places of residence, things of this nature.

Mr. Montgomery was talking to me in a very cooperative way and indicated to me in a questioning way whether or not it would be possible for him to shall we say cooperate through his activities for some future perhaps mitigation in his violation.

I said that I did not know if that would be possible.

I went on to ask him what the circumstances were concerning the present day's activities, and if he understood why he was being arrested.

He said yes, he did. He said that he had been a fool. He said that he had delivered the heroin which I had in my presence, to his brother and to Mr. Johnson on this date. He stated to me that he had done this to Mr. Nicholson or done this with Mr. Nicholson before; however, on no occasion had he ever delivered the heroin to the address on 85th Street.

He stated that he had become impatient on this particular occasion because the money had not been made available, and he had decided to bring the heroin over there.

I asked Mr. Montgomery where he had obtained the heroin, and he said he had obtained his heroin from a source of supply by the name of Hernandez in the East Los Angeles area.

He went on to add that his normal procedure for obtaining this heroin was by contacting this Hernandez, and I believe, if I recall correctly, it was a husband and wife team, and they in turn would deliver the heroin to him to a neutral meeting place, preferably in the Santa Monica or Venice area.

I asked him on how many occasions he had delivered the heroin. I don't recall, other than the fact that it had been on more than two, and he stated to me that he had obtained as much as seven ounces of heroin at one time from this Hernandez husband and wife team.

This pretty much constitutes any statement which he made concerning that day's present activities. (R. T. 82-87).

Agent Krueger next identified the envelope in which the heroin was placed. The defense stipulated to the chain of evidence and the fact that the item alleged to be heroin was in truth heroin. The evidence was offered and received (R. T. 88-94).

On Cross-examination of Agent Krueger it was adduced by counsel for defendant that the subject of leniency was

discussed; that the defendant Montgomery was inferentially informed by Agent Krueger that he might be able to cooperate with the Government. It was pointed out, however, by Agent Krueger that this subject was discussed AFTER the admissions of the defendant (R. T. 96).

The defendant Roosevelt Montgomery took the stand and testified as to his version of the offense which was in substance that he met Clint Johnson on July 19, 1967, when he came to Roy Nicholson's house. That while he, Johnson and Nicholson were at the service station he never gave anyone a package containing heroin, or any white powdery substance (R. T. 108-109).

The only money he received at the filling station was $25.00 given him by Nicholson to get an auto tape for Nicholson (That Clint Johnson never gave him anything at the service station (R. T. 110).

Defendant Montgomery further testified he was forcefully arrested and handcuffed and thrown in the back seat of the Agents' car (R. T. 111-12). He was then transferred to the Federal Building, mugged and fingerprinted and introduced to Agent Krueger. Krueger suggested that Montgomery could work with the agents and make it better for himself. He said, "you can work it off". Krueger explained that Montgomery could go out in the field and make a buy for him. Krueger told the defendant that his bail would be $10,000.00 but that it could be set lower if Montgomery would work with him. Krueger also told Montgomery that he did not need an attorney because the two of them could work it out

better without an attorney. The defendant was expressly advised not to obtain an attorney. The entire conversation between Agent Krueger and the defendant lasted approximately one hour (R. T. 112-117).

On cross-examination the defendant testified that he was out of the automobile at the gas station for about two or three minutes (R. T. 120). Montgomery testified that the story he gave Agent Krueger concerning the purchase of heroin from the Hernandez couple was deliberately fabricated so that he could have his bail reduced (R. T. 123-24).

III

ARGUMENT

A. DEFENDANT'S FAILURE TO SIGN THE WAIVER ACCOMPANYING THE MIRANDA ADMONITION DOES NOT PRECLUDE THE INTRODUCTION OF DEFENDANT'S VOLUNTARY ADMISSIONS IN EVIDENCE AT HIS TRIAL

Defendant's initial contention is his claim that once the defendant fails to sign the waiver of constitutional rights that then all questioning must immediately cease; and indeed that voluntary admissions thereafter made are inadmissible.

Agent Krueger testified that he made the following statement to defendant before conversing with him:

"A ' . . . I once again advised him that he was under arrest for violation of the federal narcotics laws. I advised him that he need not make any statement to me, that if he did make any statement to me it could be used against him in a court of law; that he did have a right ot an attorney; and if he so desired an attorney he could have one at any time during those proceedings or any proceedings thereafter; and that if he could not afford an attorney, the Government would provide one for him.

"Q [By Mr. Glassman] And did Mr. Montgomery indicate in any way that he had heard and understood the constitutional admonition which you had given to him?

"A Yes, sir, he did. He said that he understood his rights, I further asked him to read a form which our agency uses to formally advise them in writing of their rights, and I asked him if he wished to sign the form indicating simply that he understood his rights. He said that he understood his rights but he did not wish to sign any forms whatsoever.' " (R. T. 82-83).

Agent Krueger stated that while he was questioning the defendant about his personal history the defendant readily admitted his complicity in the acts alleged and that he never requested counsel to assist him (R. T. 85-87).

The Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), did not set out a specific warning which every law enforcement agency would be required to give, but rather chose to allow each agency freedom in formulating its own; the Court required only that " . . . the accused must be adequately and effectively apprised of his rights . . ." (Id. 467). Although the Court chose not to dictate a specific form, it did summarize the requisite elements of a proper warning on page 444, where it said, "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed."

In Coyote v. United States, 380 F. 2d 305 (10th Cir. 1967), cert denied 389 U.S. 976, the policy of testing a warning by its substance rather than its form was followed. The Court stated:

> "Surely Miranda is not a ritual of words to be recited by rote according to didectic niceties. What Miranda does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge over the particular words used to inform an individual of his rights. The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all his rights." Id. 308.

See also Green v. United States, 386 F. 2d 953 (10th Cir., 1967).

In Keegan v. United States, 385 F. 2d 260 (9th Cir., 1967), the Court found the substance of the following warning sufficient:

> "You don't have to say anything without the presence of an attorney. Anything that may be said out of the presence of an attorney could be held against you in a court of law. If you don't have funds to pay for an attorney, we will appoint one." Id. 262.

Certainly, the warning administered by Agent Krueger to the defendant, conveyed the information required by the Miranda decision as adequately and effectively as the warnings cited above.

Having been properly warned of his constitutional rights consideration must now be directed to the question of whether the defendant effectively waived his constitutional rights. In this case, the defendant was advised of his rights orally by Agent Krueger and was shown a written list of his rights. On both occasions the defendant stated that he understood his rights. Defendant stated that he desired not to sign any statement (R. T. 83).

The Miranda holding does not make all statements inadmissible at trial. The Court was careful to point out that:

> "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given

freely, voluntarily without any compelling influences is of course, admissible in evidence." Id. 478.

In Miranda the Supreme Court placed on the Government the burden of proving a sufficient waiver of the defendant's rights. The Government contends that it met this burden when it introduced testimony of Agent Krueger in which he stated that he had orally given the admonitions required and visibly exhibited them to the defendant and that defendant had replied to both in substance that he understood his rights (R. T. 83).

The record discloses that defendant never requested that an attorney be present during the interrogation; therefore, there is no evidence that Agent Krueger refused such a request or that the interrogation was in violation of the Miranda requirements. After being informed of his right to counsel appellant merely stated that " . . . he understood his rights" (R. T. 83). Once again Agent Krueger showed appellant his rights in written form and appellant made the identical response (R. T. 83). As Agent Krueger was obtaining personal background information from defendant, the defendant himself after the full admonitions which had been given, readily responded to the questions asked by Agent Krueger and made admissions concerning his complicity in the alleged acts.

After having been fully advised of his rights and indicating that he understood them, the defendant chose to speak. As such, the record clearly demonstrates a knowing and intelligent waiver.

In United States v. Hayes, 385 F. 2d 375 (4th Cir., 1967), the defendant was asked whether he understood the warning, or whether he wanted the assistance of counsel. The Court held that:

> "... we cannot accept appellant's suggestion that because he did not make a statement -- written or oral -- that he fully understood and voluntarily waived his rights after admittedly receiving the appropriate warning, his subsequent answers were automatically rendered inadmissible. Of course, the attendant facts must show clearly and convincingly that he did relinquish his constitutional rights knowingly, intelligently, and voluntarily, but a statement by the defendant to that effect is not an essential link in the chain of proof." Id. 377. (Emphasis added)

In this case the Government has shown that the defendant was asked whether he understood his rights on more than one occasion and that to each inquiry defendant answered that he did (R. T. 83). This certainly exceeds the requirements of the Hayes case.

In Coughlan v. United States, 391 F. 2d 371 (9th Cir., 1968), the Court held certain statements admissible even though the record failed to disclose an express statement that the defendant waived his rights.

In Moore v. United States, (9th Cir. No. 22,501 decided Oct. 22, 1968), a recent case interpreting the Miranda case the

Court in discussing Miranda stated:

> "Miranda v. Arizona, 384 U.S. 436 (1966), requires the government to show not only that the accused was effectively informed of his privilege against self-incrimination and his right to the assistance of counsel, but also that the accused knowingly and intelligently waived these rights. Moreover, 'A valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.'" 384 U.S. at 475.

Applying this language to the Moore case, the Court stated:

> "The record is devoid of any evidence that appellant waived his rights before making the admissions to which Officer Pelz testified. Since we cannot say that the error 'does not affect substantial rights' (Federal Rules of Criminal Procedure, page 52(a)), or 'that it was harmless beyond a reasonable doubt' (Chapman v. California, 386 U.S. 18, 24 (1967)), the judgment must be reversed."

In the Moore case cited above, after the defendant had been admonished as to his rights, he remained totally silent as to his understanding and/or waiver of those rights. Shortly thereafter defendant made admissions to the officer who had admonished him (R.T. 25 and 48).

It is clear that waiver may not be presumed from mere silence as in Moore, supra.

In the instant case there is a distinguishing feature which establishes a waiver of constitutional rights. Upon being advised as to his constitutional rights here defendant Montgomery did not remain silent, rather he stated that he fully understood his constitutional rights (R. T. 82-83).

Thereafter, when defendant Montgomery volunteered his admissions to Agent Krueger he did so knowingly and intelligently. His waiver of his rights was manifestly demonstrated by his breaking of silence to state that he understood the admonition and in spite of it continued to converse with Agent Krueger.

It should be noted that counsel for the defendant did not object to the introduction of the admissions of the defendant because of insufficiency of waiver or lack of proper warning, but rather objected on other and unrelated grounds (R. T. 85).

B. TESTIMONY OF AN INFORMANT IS ITSELF SUFFICIENT TO SUPPORT A CONVICTION

Defendant contends somewhat nebulously that a substantial part of the Government's case rested upon the uncorroborated testimony of a Government informant. Note that defendant only contends that it was a substantial part, not the entire case (Brief for Defendant 12-15). The distinction is unnecessary as the law is settled that the entire case resulting in a conviction can rest

upon the uncorroborated testimony of an informant or accomplice.

In responding to a similar contention where the conviction was solely based on an accomplice's testimony, the Ninth Circuit in Audett v. United States, 265 F. 2d 837, 846-47 (9th Cir., 1959), states:

> "The short answer is that the federal doctrine which permits such conviction is sound and consonant with the rule obtaining in the law of evidence that the testimony of one witness, if believed, is sufficient to prove a fact, is approved by the Supreme Court and is firmly established in the law of this and other circuits."

The ruling set forth in Audett, supra, was reaffirmed in White v. United States, 315 F. 2d 113, 115 (9th Cir., 1963), and Williams v. United States, 308 F. 2d 664, 666 (9th Cir., 1962). The reason for this rule appears to be that it is for the trier of fact to ascertain the weight and credibility to be given the testimony of an accomplice or informer, and if it is believed beyond a reasonable doubt then it is sufficient to convict.

In the present appeal the testimony of the informant is amply corroborated by Agent Krueger and the voluntary admissions of the defendant himself. It is respectfully submitted that abundant evidence and testimony exists to affirm defendant's conviction.

C. THE SENTENCE IMPOSED BY THE TRIAL COURT WAS PROPER AND NOT AN ABUSE OF JUDICIAL DISCRETION

Defendant contends that because he pursued trial by jury he was punished unconstitutionally by the trial judge inasmuch as defendant's sentence was more severe than the co-defendant who pled guilty (Defendant's Brief 16).

Defendant was convicted on September 27, 1967, of two counts violating 21 U.S.C. §174 which states:

> "§174 . . . Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition may be fined not more than $20,000.00 . . . "
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession

shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The statute above clearly states the penalty for a violation of the statute and the imposition of the sentence by the trial judge can extend to the maximum and is entitled to the greatest credence.

> "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits by a statute." See Gurara v. United States, 40 F. 2d 338, 340-41 (8th Cir., 1930).

The Ninth Circuit has repeatedly refused to question or interfere with the trial judge's discretion in imposing a sentence when it is within the statutory limit. See Bryson v. United States, 265 F. 2d 914 (9th Cir., 1959); Brown v. United States, 222 F. 2d 293, 298 (9th Cir., 1955); Russell v. United States, 288 F. 2d 520, 524 (9th Cir., 1961).

The sentence imposed upon defendant was ten years in the custody of the Attorney General on each count, both sentences to run concurrently, which obviously is not the maximum punishment which could have been imposed.

Defendant has based his argument on this point upon a portion of the trial court's remarks which are taken completely out of context which, even though unavailing, give the remarks more

importance than they have in context (Defendant's Brief 17).

What must be considered to place these remarks in context is that the trial judge referred this case to the Probation Department for the purposes of receiving a pre-sentencing report (R. T. 210). At the time of sentencing, the probation report and evaluation was discussed at length between the trial judge and counsel for defendant (R. T. 217-226).

The trial court made it abundantly clear that the main consideration in sentencing the defendant was the information contained within the probation report itself.

Based upon the above-mentioned facts, it is respectfully submitted that defendant's contention that the sentencing was made more severe because of the defendant's exercise of trial by jury is frivolous, erroneous and without merit.

There exists a line of authority establishing that it is a matter of discretion for the trial court to have a pre-sentence report prepared. In United States v. Karavias, 170 F. 2d 968, 971 (7th Cir., 1948), the court rejected defendant's contention that Rule 32 (c), Federal Rules of Criminal Procedure, imposed an obligation on the District Court judge to have a pre-sentence report prepared prior to sentencing. The court said:

> "[R]ule [32 (c)] plainly indicates that the mandate is upon the probation officer and not upon the court. The court is not obliged to order a pre-sentence report or to utilize the services of the probation department prior to passing sentence."

This same rule was applied by the Ninth Circuit in the case of Sherman v. United States, 261 F. Supp. 522, 532; D. C. Hawaii (1966), aff'd 383 F. 2d 837 (9th Cir., 1967), where the court stated:

> "Although the normal procedure before sentencing is that the pre-sentence investigation is made and presented to the court, there is nothing in any of the statutes or rules which demands that such a pre-sentence investigation or report be made, filed with the court or considered by the court before sentencing."

The defendant Montgomery's contention that the severity of his sentence was determined solely upon his availing himself of a jury trial is without merit. In fact, the manner in which the sentencing was conducted by the trial judge was an exemplary procedure, giving full consideration to all pertinent facts and giving defendant full opportunity to present all facts on his behalf.

D. THE STATUTORY RULE OF EVIDENCE PERMITTING CONVICTION UPON EVIDENCE OF UNEXPLAINED POSSESSION OF HEROIN IS NOT UNCONSTITUTIONAL

Defendant's attempt to reverse his conviction because the trial court might have applied the statutory rule of evidence is without merit. It is clear that the provision in 21 U.S.C. §174 which permits conviction upon a showing of unexplained possession of the narcotic drug heroin, functions as a ". . . statutory rule

of evidence . . . " Erwing v. United States of America, 323 F. 2d 674, 679 (9th Cir., 1963). Cf. United States v. Gainey, 380 U. S. 63 (1965). As this Court said:

> "Thus the function of 'possession' in the statutory scheme is to shift to the defendant the burden of identifying the legitimate source of the narcotic drugs, if indeed they were not illegally imported. This statutory rule of evidence rests upon (1) the rational relationship between 'possession' of narcotic drugs by the defendant and knowledge on his part that a substance which is normally imported and rarely imported legally, was in fact imported contrary to law, plus (2) as a corollary, the consideration that the 'possessor' of the narcotic drugs has so much more convenient access to the facts as to their source that it is not unreasonable to require him to come forward with an explanation. Hernandez v. United States of America, 300 F. 2d 114, 118, 119 (9th Cir., 1962)."

The Supreme Court and this Court have repeatedly upheld the rationality of this rule when dealing with heroin. Yee Hem v. United States of America, 268 U. S. 178 (1925). In Juvera v. United States of America, 378 F. 2d 433, 437 (9th Cir., 1967), this Court described the charge of unconstitutionality as " . . . an utterly groundless assertion." When the challenge

arose in a prosecution under 21 U.S.C. §176 (a), this Court rejected it. Zaragoza v. United States of America, 389 F. 2d 468 (9th Cir., 1968).

In United States v. Gainey, 380 U.S. 63 (1965), an analogous statutory inference was sustained by the Supreme Court. It said:

> " . . . the constitutionality of the legislation depends upon the rationality of the connection 'between the facts proved and the ultimate fact presumed' (citation). The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."
> (at pp. 66, 67).

This Court recognized the rationality, when heroin is the narcotic drug, in two recent cases. Verdugo v. United States, No. 20,803 (9th Cir., 1968) slip opinion; Morgan v. United States, 391 F 2d 237, 238 (9th Cir., 1968). In both cases, the court relied upon statutory sources and common experience. It can, of course, also rely on its collegiate experience of many years and thousands of cases, like those cited, and like this one, where the evidence shows the foreign origin of the contraband.

The report by the U. S. Treasury Department, Bureau of

Narcotics, for the year ended December 31, 1966, entitled "Traffic in Opium and Other Dangerous Drugs" states:

> "There are two main currents of illicit traffic in opium and the opiates; one from the Middle East to North America; the other from southeast Asia to Hong Kong, Japan, China (Taiwan) and the west coast of North America. Secondary flows include routes from Mexico to the United States. The American continent is a principal target of the illicit heroin traffic." (at p. 31).

Granting the rationality of this rule of evidence, defendant has no standing here to raise it. The evidence established defendant in possession of heroin and the direct evidence supports a conclusion that the heroin was imported contrary to law and that the defendant knew it.

Erwing v. United States, 323 F. 2d 674 (9th Cir., 1963), relied upon by defendant, is distinguishable. The defendant there introduced evidence to show that the operation of the statutory rule in that case would not be rational because there was no way to tell whether the cocaine involved was imported. Cocaine was legally manufactured and distributed in the United States, and there was no evidence to show the defendant in possession of any substance which was not legal in the United States. In this case, defendant introduced no evidence of any kind with respect to the rationality of the statutory rule.

Further, in our case, there was evidence that the statutory rule was operating rationally. As to heroin, the rule always seems to be rational, considering the present laws. See 21 U.S.C. §§ 173, 188b, 188c, 188d.

The adoption of defendant's position regarding the statutory rule would vastly increase the already great difficulty of controlling the illegal, clandestine traffic in heroin. The only beneficiaries would be the importers, distributors and wholesalers engaged in this illicit industry. The constitution does not require, and sound policy forbids this result, unless a compelling,overriding interest can be shown. Congress and the President, in enacting these statutes, have said none exists, and defendant has not given this Court any reason to contradict that judgment. (In Leary v. United States, 392 U.S. 903 (1968), certiorari has been granted on this issue.)

E. THE MARCHETTI, HAYNES AND GROSSO DECISIONS DO NOT PROVIDE A BASIS FOR NULLIFYING 21 U.S.C. §174

Defendant's mysterious, unexplained contention that the decisions in Marchetti v. United States, 390 U.S. 39 (1968), Grosso v. United States, 390 U.S. 62 (1968), and Haynes v. United States, 390 U.S. 85 (1968), are authority for the proposition that 21 U.S.C. §§ 174, 176a "directly or indirectly [violate] the privilege against self-incrimination", is incorrect. [Defendant's Brief, p. 21]. Neither the reported decisions nor an analysis of the statute sustains

defendant's contention.

An analysis of the operation in this case of 21 U.S.C. §174 shows the claim to be untenable. Defendant has not been convicted of failing to register his possession of the heroin. He has been convicted, in both counts, of "receiving, concealing and facilitating the transportation and concealment." Defendant could not have complied with either statute by registering his intent to possess before, or his possession after, he acquired the contraband. The only point at which a declaration could have affected the character of the contraband was at the time and place of entry into the United States.

The tax statutes, which do contain registration requirements, are not part of this statutory scheme. This Court has already recognized that there is no relationship between 21 U.S.C. §174 and some of the narcotics taxing statutes. In Verdugo v. United States of America, No. 20,803 (9th Cir., 1968) (slip opinion, pp. 8 and 9), the court said:

> "None of the cases cited in Mathes-Devitt's work in support of the instruction suggests this interrelationship between 21 U.S.C. §174 (1964) and the narcotic-taxing statutes 26 U.S.C. §§ 4701-4707 (1964). We have found none that do. 26 U.S.C. §4704 (a) (1964) can be traced no farther back than the act of February 24, 1919, 40 Stat. 1131, or perhaps, considered more generally, the Act of December 17, 1914, 38 Stat. 785. The origins of 21 U.S.C.

§174 are found in the Act of February 9, 1909, 35 Stat. 614. When Congress made it an offense to 'conceal" narcotic drugs in 1909 it could hardly have had in mind their failure to satisfy a tax obligation which did not exist until 1919, or 1914, at the earliest."

There are other federal statutes relating to heroin 26 U.S.C. §4701 et seq. and other state statutes relating to heroin. See California Health and Safety Code, §§ 11530, 11501. Defendant could have been convicted on some of them on this evidence. But, while he might have avoided some of those prosecutions by registration, he could not have avoided these, once he acquired the contraband. Convictions under other statutes are not before this Court in this case.

Further, 21 U.S.C. §174 is not directed towards a highly selective group inherently suspect of criminal activities. This Court should not accept defendant's implied argument that "the narcotic drug business consists entirely, or even in the main, of shadowy figures in the underworld passing small glassine bags in dark alleyways . . ."

"As of December 1966 there were 894,193 persons duly registered under the narcotics laws who were authorized to obtain written order forms from the government and engage legitimately in narcotic drugs transactions, and of these only one

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"As of December 1966 there were 394,193 persons duly registered under the narcotics laws who were authorized to obtain written order forms from the government and engage legitimately in narcotic drugs transactions, and of these only one

person was prosecuted during 1966 for a violation . . . [in 1966] over 170,000 kilograms of opium and over 260,000 kilograms of coco leaves were imported legally into the United States while only approximately 100 kilograms of narcotic drugs were seized or purchased in the illicit market by federal agents . . . It would not be factual to say of the narcotic statutes and regulations what the Supreme Court said of other more general tax provisions - that they are 'directed at the public at large' . . . It would be equally inaccurate, however, to say, that they are 'directed at a highly selective group inherently suspect of criminal activities." (United States v. Minor, No. 31953 (2d Cir., July 3, 1968) (slip opinion, at pp. 2960, 2961).

21 U.S.C. §174, in connection with this indictment, does not accuse defendant of any crime for failing to declare the heroin at importation. His crime is receiving, etc. a particular class of heroin, that is, that which ". . . theretofore had been imported and brought into the United States contrary to law."

Any merchandise being brought into the country must be declared at the time of importing, or as soon thereafter as is practicable, to the customs officer. 19 U.S.C. §§ 1459, 1461, 1463. The heroin would not have been permitted through. 21 U S.C. §173. At that point, it would not have the character

necessary to a conviction under 21 U.S.C. §174, United States v Reyes, 280 F.Supp. 267 (S.D.N.Y. 1968), Arrizon v. United States, 224 F.Supp. 26 (S.D.Calif. 1963). If the heroin were seized under 49 U.S.C. §§ 781, 787 (d), the matter would be ended. Only after the heroin is imported contrary to law, does it fall within the class which permits conviction under 21 U.S.C. §174. Defendant, if he was the importer, cannot complain of his own failure to see that the customs law was satisfied at a time when he would not have been convicted, and, if he was not the importer, he was required to declare nothing.

The pith of defendant's contention seems to be that Marchetti, Grosso and Haynes permit him to participate in the importation of narcotics, and the violation of customs law, without criminal penalty. That position should be rejected.

F THE INDICTMENT NEED NOT ALLEGE IN WHAT RESPECT THE IMPORTATION OF HEROIN WAS UNLAWFUL

The general rule is that an indictment tracking the statute sets out the elements of the offense and will be held sufficient. This principle has been applied to indictments similar to the defendant's.

In United States v. Rogers, 318 F.2d 536, the court states in discussing U.S.C. §174:

> 'It will be observed that the statute denounces: (1) fraudulent or knowing importation

necessary to a conviction under 21 U. S. C. §174, United States v. Reyes, 280 F. Supp. 267 (S. D. N. Y. 1968); Arrizon v. United States, 224 F. Supp. 26 (S. D. Calif. 1963). If the heroin were seized under 49 U. S. C. §§ 781, 787 (d), the matter would be ended. Only after the heroin is imported contrary to law, does it fall within the class which permits conviction under 21 U. S. C. §174. Defendant, if he was the importer, cannot complain of his own failure to see that the customs law was satisfied at a time when he would not have been convicted, and, if he was not the importer, he was required to declare nothing.

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In United States v. Rogers, 218 F. 2d 536, the court states in discussing U. S. C. §174:

> 'It will be observed that the statute denounces: (1) fraudulent or knowing importation

or bringing in of any narcotic drug contrary to law; and (2) receiving, concealing, etc., any such narcotic drug, after being imported or brought in, knowing the same to have been imported contrary to law. The indictment here follows the exact language of the second clause of the statute. The phrase, 'contrary to law,' as used in the first clause, is not a part of the offense defined in the second clause. Even if it had been used there, it is difficult to understand how a defendant could know that a narcotic drug had been imported contrary to law unless it had been so imported."

The above language is dispositive of defendant's contention.

CONCLUSION

For the reasons stated above, the conviction should be affirmed.

Respectfully submitted,

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